Workon Sdn Bhd v The Director of Lands & Surveys, Sabah

HIGH COURT (SANDAKAN) — ORIGINATING MOTION NO S-25-04 OF 1998
RICHARD MALANJUM J
11 AUGUST 1999

Administrative Law *— Remedies — Mandamus — Application for — Principles applicable — Applicant must show distinct demand for performance of duty and unequivocal refusal to comply with demand — Mandamus to issue only against authority who is in position or obliged to perform such duty — Proof of duty, and not merely discretion imposed on such authority — Whether another legal remedy that is equally beneficial, convenient and effective is available — Whether mandamus should be granted*

Pursuant to its application, the applicant was given an approval to register a draf title of a piece of land vide a letter of approval dated 15 December 1995. The applicant accepted the offer and paid the necessary premium. Thereafter, a draft title was issued in favour of the applicant. It was duly signed by the applicant and returned to the Lands and Surveys Department on 17 June 1997. However up to now, the draft title has not been registered in the name of the applicant. Between March and April 1997, it was discovered that the area applied by the applicant were overlapping with the area applied by the interveners. The applicant made an application for an order of mandamus pursuant to O 53 r 2 of the Rules of the High Court 1980. Specifically, the order sought for was: 'an order of mandamus against the Director of Lands and Surveys (the respondent) to issue the document of title ... in favour of the applicant'. The applicant contended that the provision of s 9 of the Sabah Land Ordinance ('the Ordinance') imposed the duty upon the respondent.

Held, dismissing the application:

(1) An applicant for an order of mandamus must show that he has demanded performance of the duty and the authority obliged to discharge it has refused that performance. There must be a distinct and specific demand or request to the authority that it performs the duty imposed upon it. And there must be an unequivocally manifested refusal to comply with the demand or request on the part of the authority (see p 183G–I).

(2) The basic complaint of the applicant was the non-registration and thus the issuing of the title deed. Section 89 of the Ordinance made reference to the Registrar on the function of registration and not the respondent. Yet the Registrar was not a party to the present application. And there is nothing to show in the Ordinance that the Registrar is subject to the direction of the respondent. It would therefore be inconceivable for an order of mandamus to be issued upon the respondent to do a task, namely to register the draft title, which he is not in the position or obliged to perform. And the respondent would not be able to issue a title deed unless registered (see p 189A–B, G).

(3) In the event that the court was wrong in the foregoing, this application would be refused because s 9 of the Ordinance imposes only a discretion upon the respondent and not a duty. The applicant was not seeking for an order to secure performance of a duty to exercise the discretion or to exercise it based on proper legal principles. What was being sought for was 'an order of mandamus against the Director of Lands and Surveys (the respondent) to issue the document of title ... in favour of the applicant'. That was not the same as asking for an order that the respondent performs his duty to exercise his discretion (see pp 189I–190B).

(4) Even if it was an application for an order that the respondent performs his duty to exercise his discretion, in this case the respondent had not unequivocally manifested his refusal to comply what he has been requested to perform. Based on the stand taken by the respondent, it would appear that it was not so much of the respondent blatantly refusing to perform his duty, if at all it is a duty or to perform his duty to exercise his discretion. Rather, there was a need to clear some outstanding matters (see p 190B–D).

(5) Mandamus is pre-eminently a discretionary remedy. It will be refused if another legal remedy that is equally beneficial, convenient and effective is available. In the present case, there is an alternative remedy, namely for the applicant to go for a civil action for breach of contract if at the end of the day the acceptance of the letter of offer comes to nothing. Such a course of action would be more convenient, beneficial and effective in view of the discretionary nature of s 9 of the Ordinance. As such, this is not a case of where an order of mandamus is the only relief (see pp 184A–B, 191D–E).

[Bahasa Malaysia summary

Berikutan dengan suatu permohonan, pemohon telah diberikan kebenaran untuk mendaftarkan suatu draf hak milik melalui suatu surat kebenaran bertarikh 15 Disember 1995. Pemohon telah menerima tawaran tersebut dan telah membayar premium yang perlu. Selepas itu, suatu draf hak milik telah dikeluarkan kepada pemohon. Ia telah ditandatangani oleh pemohon dan dikembalikan kepada Jabatan Tanah dan Mengukur pada 17 Jun 1997. Namun sehingga kini, draf hak milik belum lagi didaftarkan di atas nama pemohon. Antara Mac dan April 1997, adalah didapati bahawa kawasan yang dipohon oleh pemohon telah bertindih dengan kawasan yang dipohon oleh pencelah-pencelah. Pemohon telah membuat permohonan untuk perintah mandamus menurut A 53 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980. Secara khusus, perintah yang dipohon adalah untuk 'suatu perintah mandamus terhadap Pengarah Tanah dan Mengukur (responden tersebut) untuk mengeluarkan dokumen hak milik ... yang berpihak kepada pemohon'. Pemohon menegaskan bahawa

peruntukan s 9 Ordinan Tanah Sabah ('Ordinan tersebut') telah meletakkan tugas ke atas responden.

Diputuskan, menolak permohonan:

(1) Seorang pemohon untuk suatu perintah mandamus mestilah m nunjukkan bahawa beliau menuntut pelaksanaan tugas dan pihak berkuasa yang sepatutnya menjalankan tugas tersebut enggan melaksanakannya. Mestilah terdapat tuntutan yang berbeza dan spesifik atau permintaan kepada pihak berkuasa bahawa ia melaksanakan tugas yang telah dikenakan. Dan mestilah terdapat keengganan yang jelas untuk mematuhi tuntutan dan permintaan tersebut oleh pihak berkuasa tersebut (lihat ms 183G–I).

(2 Aduan asas pemohon adalah ketiadaan pendaftaran dan pengeluaran dokumen hak milik. Seksyen 89 Ordinan tersebut telah merujuk kepada Pendaftar berkenaan dengan fungsi pendaftaran dan bukannya responden. Tetapi Pendaftar bukanlah suatu pihak kepada permohonan ini dan tidak terdapat apa-apa di dalam Ordinan yang menunjukkan yang Pendaftar adalah tertakluk kepada arahan responden. Oleh itu, adalah tidak wajar untuk suatu perintah mandamus dikeluarkan terhadap responden untuk melakukan tugas, iaitu mendaftarkan draf hak milik, di mana beliau bukan dalam kedudukan tersebut untuk melaksanakannya atau enggan melaksanakannya. Dan responden tidak boleh mengeluarkan dokumen hak milik kecuali ia telah didaftarkan (lihat ms 189A–B, G).

(3) Dalam keadaan di mana mahkamah adalah silap di atas, permohonan ini akan ditolak kerana s 9 Ordinan tersebut meletakkan budi bicara di atas responden dan bukannya suatu tugas. Pemohon tidak memohon untuk suatu perintah untuk menjamin pelaksanaan suatu tugas untuk menjalankan budi bicara atau menjalankannya berdasarkan prinsip-prinsip undang-undang yang sah. Apa yang dipohon adalah 'suatu perintah mandamus terhadap Pengarah Tanah dan Mengukur (responden tersebut) untuk mengeluarkan dokumen hak milik tersebut ... yang berpihak kepada pemohon'. Itu adalah tidak sama dengan memohon untuk suatu perintah bahawa responden melaksanakan tugasnya untuk menjalankan budi bicara (lihat ms 189I–190B).

(4) Walau sekalipun permohonan untuk suatu perintah bahawa responden melaksanakan tugasnya untuk menjalankan budi bicaranya, di dalam kes ini responden tersebut telah tidak secara jelas menunjukkan keengganannya untuk mematuhi apa yang diminta untuk dilaksanakan. Berdasarkan pendirian yang diambil oleh responden, adalah seolah-olah bukanlah responden yang secara terang-terangan enggan melaksanakan budi bicaranya. Sebaliknya, terdapat keperluan untuk menyelesaikan beberapa perkara yang belum diselesaikan (lihat ms 190B–D).

(5) Mandamus dengan jelas adalah suatu remedi budi bicara. Ia akan ditolak jika terdapat remedi undang-undang yang lain yang juga mempunyai benefisial yang sama, mudah dan berkesan. Di dalam kes ini, terdapat remedi alternatif yang lain, iaitu untuk pemohon membawa tindakan sivil untuk pemecahan kontrak jika di akhir hari penerimaan surat tawaran tersebut tidak membawa apa-apa makna. Tindakan sebegini adalah lebih mudah, benefisial dan berkesan dengan melihat kepada bentuk budi bicara s 9 Ordinan tersebut. Oleh itu, ini bukanlah suatu kes di mana suatu perintah mandamus adalah relif tunggal (lihat ms 184A–B, 191D–E).]

Notes

For cases on mandamus, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 443–468.

Cases referred to

Chan Mun Poy v Director-General of Telecommunications & Anor [1981] 2 MLJ 293 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

Lim Fong Tsin & Ors v The Assistant Collector of Land Revenue & Ors (1997) CLJ LN 7 (refd)

Padfield v Minister of Agriculture, Fisheries and Foods [1968] AC 997 (refd)

R v Port of London Authority, ex p Kynock Ltd [1919] 1 KB 176 (refd)

R v Tower Hamlets LBC, ex p Kayne-Levenson [1975] QB 431 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Sa-Mal (Sabah) Corp Sdn Bhd v Director of Lands and Surveys, Sabah (OM No K 4 of 1992 (unreported)) (refd)

Legislation referred to

Rules of the High Court 1980 O 53, O 53 r 2
Sabah Land Ordinance ss 4, 9, 13, 14, 47, 88, 89
Sabah Land Rules (GN 505 of 1930) r 2(4)
Specific Relief Act 1950 s 44

David Wong (*Peter Lo & Co*) for the applicant.
Juprin Wong Adamal (*Senior State Counsel*) for the respondent.
Jonathan Yassin (*Donald Mojuntin & Seibing Gunting*) for the interveners.

Cur Adv Vult

Richard Malanjum J:

Preliminary

The matter before me is an application for an order of mandamus by the applicant vides notice of motion dated 19 September 1998 (encl 20)

pursuant to O 53 r 2 of the Rules of the High Court 1980. Specifically, the order sought for is 'an order of mandamus against the Director of Lands and Surveys (the respondent) to issue the document of title in respect of Draft Title Country Lease Number 085328016 in favour of the applicant'. At the leave stage only the respondent was cited as a party. However when the case was fixed for hearing proper the interveners applied to be joined in the proceeding. Hearings of the matter were fixed on several occasions but adjourned for various reasons mainly on the application of learned counsel for the parties.

The relevant basic facts

Several affidavits were filed in connection with this application. They are as follows:

(1) Affidavit in support of Richard Koh Kin Lip affirmed on 3 August 1998 (Koh's first affidavit);

(2) Affidavit in opposition of Julita bte Mani, Simon bin Gasis and Sabin bin Gunting sworn to on 22 January 1999 (interveners' first affidavit);

(3) Supplementary affidavit of Sabin bin Gunting sworn to on 13 May 1999 (Sabin's affidavit);

(4) Affidavit in reply of Richard Koh Kin Lip affirmed on 24 May 1999 (Koh's second affidavit); and

(5) Affidavit in reply of Simon bin Gasis sworn to on 28 May 1999 (Gasis's affidavit) in reply to Koh's second affidavit.

I note that there is no affidavit filed by the respondent.

From these affidavits there are facts that are not in dispute.

The subject matter of the present application is a piece of land measuring approximately 380 acres ('the land') situated at Luangmanis, Beluran, Sandakan, Sabah, Malaysia. On one hand it was shown that pursuant to its land application No 91080197 the applicant was given an approval vide a letter of approval dated 15 December 1995 under reference LS 801.1.3255(T) 61. The applicant accepted the offer the next day. A sum of RM57,000 was also paid on 18 December 1995 representing 55.10% of the premium payable totalling RM103,275. The balance of RM46,275 was subsequently paid on 17 June 1997. Thereafter a draft title No 085328016 was issued in favour of the applicant. It was duly signed by the applicant and returned to the Lands and Surveys Department on 17 June 1997. However up to now the draft title has not been registered in the name of the applicant. Hence this application was filed.

On the other hand it was also disclosed that the interveners submitted their land applications for 50 acres each in 1993 and were issued respectively with official receipts No 14087718, 14087716 and 14087717 all dated 3 July 1993. Thereafter they proceeded to develop their respective pieces applied for by planting oil palm although the relevant authority had not issued any approval to their applications. The crop is now producing and the interveners have also secured permission from the authority to sell the fruits. That the pieces they had applied for were overlapping with the

area applied for by the applicant came to light when between March and April 1997 a private surveyor, Juruukur Asia, engaged by the applicant, came to their pieces to begin survey work. Such incident led to the interveners sending their objection to the assistant collector of Land Revenue, Beluran. The member of parliament for Beluran also wrote a letter dated 17 July 1997 to the district surveyor seeking for the postponement of the survey work on the said land pending the settlement of the claims of the interveners through the process of land enquiry. And a further objection letter dated 7 August 1997 was also sent to the assistant collector of Land Revenue Beluran by the solicitors of the interveners. The end result of those letters was a reply dated 4 June 1998 (JSS 22a of interveners' first affidavit) coming from assistant collector of Land Revenue Beluran stating, inter alia, that no further land enquiry would be necessary since there was already an enquiry held earlier. But that did not the end the matter. The interveners continued to write letters to several personalities including the then Chief Minister of Sabah resulting in the issuance of a letter by the Hasil Bumi dated 3 November 1998 to the Pengarah Tanah dan Ukur ie the respondent (SG-1 of Sabin's affidavit).

The contentions

On 20 May 1999 I proceeded to hear the argument of learned counsel. Unfortunately the respondent was not represented on that day although notice of hearing was duly served on the state attorney general chambers. Anyway, learned counsel for the applicant submitted that there were already two land enquiries held (on 29 July 1992 and 12 December 1995) prior to the issuance of the letter of approval to his client on 15 December 1995. And in so far as his client is concerned it has already complied with all the requirements of the Sabah Land Ordinance ('the Ordinance') in connection with its application for the said land. He further submitted that since there was no response from the respondent to the affidavits filed on behalf of his client an order in terms of the motion should be granted.

For the Interveners it was argued that there was no proper land enquiry held in respect of the areas claimed and developed by them. Learned counsel said that the two alleged land enquiries were not related to the areas and involved different parties. And he said that if an enquiry was already held in 1992 that resolved the dispute then there would have been no necessity for another in 1995. He also submitted that Hasil Bumi had already approved his clients' applications. He referred to SG-1 of Sabin's affidavit. The issue of native customary rights having been acquired by his clients was also submitted. And finally it was urged that no prerogative order should be issued where interest of third party would be affected.

Having heard the argument on that day I adjourned the hearing to another date to enable the attendance of the respondent.

On 8 June 1999 the respondent and the senior state counsel appeared to explain their absence in the previous hearing. Thereafter, the senior state counsel proceeded to state the stand of the respondent in this term, namely:

A Adamal: Refer to encl 33 — 'JSS-20' — 2nd paragraph.

...

Adamal: Our stand is that the delay in registration is due to the correspondences received from the interveners which also part of the subject land. That is the reason for the delay in the registration of the draft title.

B

There are certain issues not clear here. That is why the respondent is here. He has clear some leaving some outstanding. So that to be cleared before we can make a stand on the draft title. The Director has power to make variation on the offer under the Land Ordinance. Not asking for adjournment.

C In reply learned counsel for the applicant submitted that the interveners have no legal rights on the said land and thus this court need not consider their position in deciding whether or not to grant the order sought for. And learned counsel went on to say, inter alia, '... a reasonable interpretation of this section (s 9 of the Ordinance) would be that the Director prior to the issue of the letter of offer will be subject to the direction of the Minister. D I say this because once the letter of offer is issued and accepted, the state government in effect will be a party to a legally binding agreement. This is what has happened in the present case. In fact the only thing missing here is the simple administrative task of registering and issuing the title deed.

E *The law*

It is settled law that mandamus lies to secure the performance of a public duty in which an applicant has sufficient legal interest to the performance. The duty to be performed must be of a public nature such as duty imposed by statute, custom, common law and even contract. (see *Padfield v Minister of Agriculture, Fisheries and Foods* [1968] AC 997). Thus, where a statute F imposes a duty, the performance or non-performance of which is not a matter of discretion, an order of mandamus may be issued. But if a power or discretion only, as distinct from a duty, exists an order of mandamus will not be granted by the court except to secure performance of a duty to exercise the discretion as maybe necessary, or a duty to exercise a genuine G discretion or a discretion based on proper legal principles. (see *R v Port of London Authority; ex p Kynock Ltd* [1919] 1 KB 176 (CA); *Judicial Review* by Michael Supperstone QC and James Goudie QC at p 307). Further, it does not cover duty in relation to a matter of a private nature or character nor does it extend to the performance of a mere moral duty.

An applicant for an order of mandamus must show that he has H demanded performance of the duty and the authority or public official obliged to discharge it has refused that performance. There must be a distinct and specific demand or request to the authority or public official that it or he performs the duty imposed upon it or him. And there must be an unequivocally manifested refusal to comply with the demand or request I on the part of the authority or public official. Where there is no obvious indication that there is a refusal it is a question of fact whether such conduct tantamount to a clear determination not to comply with the demand or request. However, delay in complying with the demand or request or

indicating that compliance would be subject to unreasonable or unlawful conditions or a failure to give a direct answer to the demand or request may amount to refusal (see *R v Tower Hamlets LBC; ex p Kayne-Levenson* [1975] QB 431).

Now, mandamus is pre-eminently a discretionary remedy. It will be refused if another legal remedy that is equally beneficial, convenient and effective is available.

And speaking of the jurisdiction of the courts in this country to issue an order of mandamus, Edgar Joseph Jr FCJ in the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 had to say at p 195:

> To recapitulate, I had at the outset observed that supervisory review jurisdiction is a creature of the common law and is available in the exercise of the courts' inherent power but its extent may be determined not merely by judicial development *but also by legislative intervention.*
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> In this context, it is pertinent to note that the jurisdiction of the courts in Malaysia to issue prerogative orders is derived from the prerogative jurisdiction inherited from English decisions as well as from statute. The Courts of Judicature Act 1964, by s 25 read with para 1 of the Schedule thereto, provides that the powers of the High Court include:
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> > '*Power* to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, *or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.*' (Emphasis added).
>
> The Schedule is entitled 'Additional Powers' and this suggests powers over and above those already enjoyed by the High Court.

And as to the avenues in applying for an order of mandamus in this country two are available, namely either to pursue under s 44 of the Specific Relief Act 1950 or under O 53 of the Rules of the High Court 1980. In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 Gopal Sri Ram JCA at pp 539–541 said this:

> It is convenient at this stage to deal with the argument of Cik Haliza based upon the provisions of Ch VIII of the Specific Relief Act 1950 and in particular ss 44, 45 and 49 thereof. It may be recalled that the submission of learned senior federal counsel was to the effect that ss 44 and 45 were the *only* provisions of law under which an order of mandamus may be applied for, that no such order had been applied for in the present case, and that the learned judge had accordingly no power to issue the order of mandamus that he did.
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> I then referred her to para 1 of Schedule to the Courts of Judicature Art 1964 (to which I shall return in a moment) and to O 53 of the Rules of the High Court 1980. Her only response to these provisions was that they were merely general in nature and were subject to other specific Acts of Parliament, in this case Specific Relief Act 1950.
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> Sections 44, 45 and 49 of the Specific Relief Act 1950, upon which reliance has been placed, read as follows:
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> '44 (1) A judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a

A permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that —

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

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(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the judge the doing or forbearing is consonant to right and justice;

C

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorize a judge —

D

(a) to make any order binding on the Yang di-Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

E

45 Every application under s 44 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice, and the denial thereof; and a judge may, in his discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made. If, in the last case, the person, court, or corporation complained of shows no sufficient cause, the judge may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the judge fixes in this behalf.

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49 Neither the High Court nor any other court in Malaysia shall hereafter issue any writ of mandamus.'

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Learned senior federal counsel contended that the requirements of ss 44 and 45 had not been met, and that no order of mandamus could therefore issue. Further, the learned judge in this case was, according to her absolutely prohibited from making the order he made because of the terms of s 49.

Before dealing with the law which I apprehend to be relevant to this part of the case, I shall deal with the last point made by Cik Haliza.

H

The short answer to her argument mounted on s 49 is that the learned judge in this case did not issue a writ of mandamus. All he did was to issue an *order* of mandamus. The section having no application to the facts of this case, I entertain little difficulty in rejecting the argument of learned senior federal counsel.

I

Turning now to the argument that the remedy of mandamus may only be granted in the limited circumstances prescribed by ss 44 and 45 of the Specific Relief Act 1950, it is to be noted that there are those other two pieces of

legislation, to which I have referred, that confer power upon the court to issue mandamus. The first of these is O 53 of the Rules of the High Court 1980, rr 1(1), (2) and 2(1) of which read as follows:

'1 (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave must be made ex parte to the court, except in vacation when it may be made to a judge in chambers, and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits, to be filed before the application is made, verifying the facts relied on.

2 (1) When leave is granted to apply for an order of mandamus, prohibition or certiorari, the application for such order must be made by originating motion to a court, except in vacation when it may be made by originating summons to a judge in chambers, and, unless the court or judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion or summons and the day named therein for the hearing.'

It is apparent from the foregoing provisions that the law has provided two avenues to a litigant who is desirous of applying for an order of mandamus. He may, quite properly, have resort to either. In our jurisprudence, particularly in the area of public law remedies, it is not uncommon to find two or more avenues being made available for the pursuit of the same remedy.

Thus, in the case of the remedy of declaration, the two alternative recourses made available by the law are s 41 of the Specific Relief Act 1950 on the one hand and the inherent jurisdiction of the High Court on the other. This was recognized by the Federal Court in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177, and by this court in *AG of Hong Kong v Zauyah Wan Chik & Ors* [1995] 2 MLJ 620. (Emphasis added.)

And indeed the issue of duty in relation to an order of mandamus has been aptly described in this way:

Mandamus is the most elusive of the prerogative writs and orders. The nature of the interest an applicant must show, the nature of the duty which it is available to enforce, and the persons or bodies to whom it may issue have varied from time to time in its development. It is, of course, a judicial remedy: it is equally clear that it is a remedy to compel performance of a public legal duty, that it does not go to the Crown itself, and that it is available only if the applicant shows a sufficient interest: per Lord Scarman at p 650 in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

And as indicated earlier, to be enforceable by mandamus a public duty need not necessarily be one imposed by statute. Even a contract may be a sufficient source. But in one local case it was held that no mandamus would be issued since the relationship of the parties was purely contractual. In the case of *Chan Mun Poy v Director-General Of Telecommunications & Anor* [1981] 2 MLJ 293, Wan Sulaiman FJ said this at p 294:

I would with respect adopt what Sharma J said, on somewhat similar facts in *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180, that any duty or obligation falling upon a public servant out of a contract entered into by him as such

A public servant, cannot be enforced by machinery of a writ of mandamus or an order under s 44 of the Specific Relief Ordinance. *Mandamus does not lie to enforce a civil liability arising out of a breach of contract to enforce rights based on contract. A civil suit for damages or for the enforcement of the civil liability may be the only proper remedy in such a case.* (Emphasis added.)

B On the issue of interest of an applicant Lord Scarman in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* dealt with it in this way at p 653:

> The sufficiency of the interest is, as I understand all your Lordships agree, a mixed question of law and fact. The legal element in the mixture is less than the matters of fact and degree: but it is important, as setting the limits within C which, and the principles by which, the discretion is to be exercised. At one time heresy ruled the day. The decision of the Divisional Court in *Reg v Lewisham Union Guardians* [1897] 1 QB 498 was accepted as establishing that an applicant must establish 'a legal specific right to ask for the interference of the court' by order of mandamus: per Wright J at p 500. I agree with Lord Denning MR in thinking this was a deplorable decision. It was at total D variance with the view of Lord Mansfield CJ. Yet its influence has lingered on, and is evident even in the decision of the Divisional Court in this case. But the tide of the developing law has now swept beyond it, as the Court of Appeal's decision in *Reg v Greater London Council; ex p Blackburn* [1976] 1 WLR 550 illustrates. In the present case the House can put down a marker buoy warning legal navigators of the danger of the decision. As Professor Wade pointed out in *Administrative Law* (4th Ed, 1977) at p 610, if the Lewisham case were E correct, mandamus would lose its public law character, being no more than a remedy for a private wrong.
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> My Lords, I will not weary the House with citation of many authorities. Suffice it to refer to the judgment of Lord Parker CJ in *Reg v Thames Magistrates' Court; ex p Greenbaum* 55 LGR 129, a case of certiorari, and to words of Lord Wilberforce in *Gouriet v Union of Post Office Workers* [1978] F AC 435 at p 482, where he stated the modern position in relation to prerogative orders: 'These are often applied for by individuals and the courts have allowed them liberal access under a generous conception of locus standi.' *The one legal principle which is implicit in the case law and accurately reflected in the rule of court is that in determining the sufficiency of an applicant's interest it is necessary to consider the matter to which the application relates. It is wrong in law* G *as I understand the cases for the court to attempt an assessment of the sufficiency of an applicant's interest without regard to the matter of his complaint. If he fails to show when he applies for leave, a prima facie case, or reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The curb represented by the need for an applicant to show, when he seeks leave to apply that he has such a case is on essential protection against abuse of* H *legal process. It enables the court to prevent abuse by busybodies, cranks, and other mischief-makers. I do not see any further purpose served by the requirement for leave.*
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> *But that being said, the discretion belongs to the court; and as my noble and learned friend, Lord Diplock has already made clear, it is the function of the judges to determine the way in which it is to be exercised.* (Emphasis added.)

I *Findings and decision*

It is obvious from the application of the applicant that it is only relying on O 53 of the Rules of the High Court 1980. In other words it is seeking for

an order of mandamus and not a writ of mandamus. And before proceeding to consider the merits of this application I think it is opportune here to note first the relevant provision in the Ordinance that is alleged to impose the duty upon the respondent and such other provisions connected thereto.

Section 9 of the Ordinance is the provision that the applicant says denotes the duty of the respondent. It reads:

> Alienation of State land
>
> (1) *Subject to any general or special direction of the Minister* the Director *may alienate State land* on such terms or in such manner as is authorised by this Ordinance and may also impose special conditions in respect thereof to be set out in the title. (Emphasis added.)
>
> (2) In particular such conditions may specify the particular product or class of products which or which alone is to be cultivated, and may forbid the cultivation of any particular product or class of products.

And the incidental provisions are as follows:

Sections 13, 14, 88 and 89 of the Ordinance:

> 13 Enquiry as to native rights
>
> Upon the receipt of any application for unalienated country land it shall be the duty of the Collector to publish a notice calling upon any claimant to native customary rights in such land who is not yet in possession of a registered documentary title to moke or send in a statement of his claim within a date to be specified in the notice. If no claim is made the land shall be dealt with as if no such rights existed.
>
> 14 Collector to decide claims
>
> Claims to native customary rights shall be taken down in writing by the headman or by the Collector, and shall be decided by the Collector.
>
> 88 No title or claim to land valid unless registered
>
> *No new title and no dealing with claim to or interest in any land* except land still held under native customary tenure without documentary title *shall be valid until it has been registered in accordance with the provision of this Part.* (Emphasis added.)
>
> 89 Meaning of term registration
>
> *Every title shall be deemed to be registered under the provisions and for the purposes of this Ordinance so soon as the same shall have been marked by the Registrar* with the folium and volume or number so as to indicate its place in the Register and every dealing shall be so deemed to be registered as soon as a memorial thereof as hereinafter described shall have been entered in the register upon the folium constituted by the existing title on the land affected. (Emphasis added.)

And under the Sabah Land Rules (GN 505 of 1930) the relevant r 2(4) states:

> 2 (4) *No payments made under sub-r (3) shall confer any right whatsoever to the land applied for and acceptance of any such payment shall not constitute any undertaking that the application will be approved.* (Emphasis added.)

Now, there is no doubt that the applicant is an aggrieved party and thus has sufficient interest to come before this court. And perhaps that led to the

learned counsel for the applicant to say: 'the only thing missing here is the simple administrative task of registering and issuing the title deed.' Accordingly, it seems to me that the basic complaint of the applicant is the non-registration and thus the issuing of the title deed. But a question may be asked: whose function is that? Section 89 of the Ordinance made reference to the Registrar and not the respondent. Yet the Registrar is not a party to the present application. And there is nothing to show in the Ordinance that the Registrar is subject to the direction of the respondent. Section 4 thereof defines 'Registrar' thus:

> 'Registrar' means a Registrar of Titles appointed under this Ordinance, and includes a Deputy Registrar of Titles'.

In fact the appointment of the Registrar under the Ordinance is governed by s 47 thereof that reads:

> 47 (1) The Minister may from time to time, by notification in the Gazette, appoint, and when appointed cancel the appointment of, a Director of Lands and Surveys, a Deputy Director of Lands and Surveys and such Land Officers, Collectors, Assistant Collectors, Surveyors, Registrars and other officers, for such districts and for such duties as he may consider necessary for carrying out the provisions of this Ordinance and he may by such notification or by subsequent notification declare that any duty imposed upon or power vested in any appointee under this subsection may or shall be carried out by or exercised by any other such appointee.
>
> (2) In any district in which there may be one or more Assistant Collectors as well as a Collector, every Assistant Collector shall exercise his powers and perform his duties in conformity with the directions of the Collector.
>
> (3) In addition to the powers conferred upon him by this Ordinance the Director may exercise the powers of a Collector.

There is no indication in the Ordinance and it was not shown that in the administrative structure of the Lands and Surveys Department the Registrar is subject to the direction of the respondent in the way the respondent is under the Minister as provided in s 9 of the Ordinance.

It would therefore be inconceivable for an order of mandamus to be issued upon the respondent to do a task, namely, to register the draft title, which he is not in the position or obliged to perform. And the respondent would not be able to issue a title deed unless registered. I should therefore refuse this application on this ground itself. At the same time I am very conscious that such a point was not raised by any of the learned counsel. However it came to light in view of the basic complaint raised in the submission. And having perused the relevant provisions of the Ordinance I am inclined to think that it is a very pertinent point and should be dealt with at the outset.

In the event that I am wrong in the foregoing, I am also inclined to refuse this application as I am of the view that s 9 of the Ordinance imposes only discretion upon the respondent and not a duty (see *Lim Fong Tsin & Ors v The Assistant Collector of Land Revenue & Ors* (1997) CLJ LN 7; *Sa-Mal (Sabah) Corp Sdn Bhd v Director of Lands and Surveys, Sabah* (OM

No K 4 of 1992 (unreported)). And I note that the applicant here is not seeking for an order to secure performance of a duty to exercise the discretion or to exercise it based on proper legal principles. What is being sought for is 'an order of mandamus against the Director of Lands and Surveys (the respondent) to issue the document of title in respect of Draft Title Country Lease Number 085328016 in favour of the applicant'. That I think is not the same as asking for an order that the respondent performs his duty to exercise his discretion.

And even if it is an application for an order that the respondent performs his duty to exercise his discretion I am of the view that in this case the respondent has not unequivocally manifested his refusal to comply with what he has been requested to perform. Based on the stand taken by the learned senior state counsel appearing for the respondent it would appear that it is not so much of the respondent blatantly refusing to perform his duty, if at all it is a duty or to perform his duty to exercise his discretion. Rather, there is a need to clear some outstanding matters. Unfortunately', what are those matters have not been specifically stated due to the absence of any affidavit filed on behalf of the respondent. Be that as it may, from the exhibits annexed to the affidavits filed by the interveners there appears to be a fresh direction from the Minister through the office of the Setiausaha Hasil Bumi (SG-1 of Sabin's affidavit) to the respondent. The letter from the Setiausaha Hasil Bumi dated 3 November 1998 addressed to the respondent states, inter alia,:

> 2 Sila maklum bahawa PT 93081310-1312 oleh Puan Julita Bte Mani & dua (2) peserta diluluskan pada prinsipnya seluas tidak melebihi 50 ekar tertakluk kepada peruntukan-peruntukan Ordinan Tanah Bab 68, permohonan-permohonan tanah tersebut perlu diproses mengikut prosedur yang ditentukan.
>
> 3 Permohonan-permohonan tanah ini disentuh dalam surat Juruukur Daerah Sandakan bil 96089020/40 bertarikh 30 Oktober 1996 kepada Penolong Pemungut Hasil Tanah, Beluran.
>
> 4 Tindakan susulan diperlukan.

As regards the letter of the juruukur daerah referred thereto I note that there was in fact an instruction given to the Juru Ukur Asia. And it reads:

> Please be informed that the issuance of RSP is subject to the ground survey and land not committed and not occupied by other people. Therefore your survey should exclude area which had been planted or occupied by other people.

Hence, although the direction came well after the letter of the assistant collector of Land Revenue, Beluran dated 4 June 1998 (JSS-22a of Interveners' first affidavit) which refused any further land enquiry, I think the fresh direction has provided a valid basis for the respondent to take such a stand as stated by the learned senior state counsel. I am of the view that it is only fair that the respondent should be given the opportunity to clarify the fresh direction before any further step is taken. Hence, on the facts and circumstances of this case I do not think the failure of the respondent to answer the demand of the applicant to perform his duty, if at all it is a duty, or to perform his duty to exercise his discretion, should be taken as an

outright refusal to perform. Further, to grant this application in spite of the direction of the Setiausaha Hasil Bumi would effectively be forcing the respondent to ignore an instruction from the Minister under which he is subject to specific or general direction in law. That I think would not be in consonant with s 9 of the Ordinance. And that would not be healthy from the aspect of administration as well. Thus the foregoing is yet another reason why I should refuse to grant the order sought for.

Meanwhile, I have noted the view expressed by the learned counsel for the applicant on the interpretation of s 9 of the Ordinance as a possible answer to the preceding point. However, to agree with him would tantamount to saying that once a letter of offer is issued there is no reversal and that a successful applicant is in good a position as a registered owner. That I think is not the intention of the Ordinance. Section 88 is clear on that. At best therefore such applicant, as the applicant in this case, may only have a valid contract with the respondent. And that seems to be the view as well of learned counsel for the applicant when he submitted that: 'the state government in effect will be a party to a legally binding agreement.' Thus, there is an alternative remedy in such a situation, namely, for the applicant to go for a civil action for breach of contract if at the end of the day the acceptance of the letter of offer comes to nothing. Such a course of action would, I think, be more convenient, beneficial and effective in view of the discretionary nature of s 9 of the Ordinance. And as such this is not a case of where an order of mandamus is the only relief. For this reason as well and in the exercise of my discretion that I should therefore decline to grant the order sought for.

Finally, learned counsel for the applicant urged this court to ignore the position of the interveners in considering this application. In view of my decision hereinabove I do not think it is necessary for me to express any view on the validity of such a submission. Suffice it to say that the grounds for refusing to grant an order of mandamus are by no means exhaustive. (see *De Smith's Judicial Review of Administrative Action* — 4th Ed at p 558).

Conclusion

For the reasons herein I therefore dismiss this application with costs to the respondent and the interveners to be taxed unless agreed.

Application dismissed.

Reported by Jafisah Jaafar